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In the Supreme Court of the United States

OCTOBER TERM, 1978

BANGOR AND AROOSTOOK RAILROAD CO. and CANADIAN PACIFIC LIMITED, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-37) is reported at 574 F. 2d 1096. The opinion of the court of appeals on petition for rehearing (Pet. App. A-40 to A-46) is not yet reported. The opinion of the Interstate Commerce Commission (Pet. App. A-50 to A-126) is reported at 356 I.C.C. 749.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-38 to A-39) was entered on March 30, 1978. A petition for rehearing was denied on May 12, 1978. The petition for a writ of certiorari was filed on June 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

QUESTIONS PRESENTED

1. Whether the Commission's finding that petitioners violated 49 U.S.C. 3(4) by engaging in preferential solicitation and distribution of traffic to the undue prejudice of other carriers is supported by substantial evidence and consistent with the First Amendment.

2. Whether the Commission was authorized to assess damages for the violation of 49 U.S.C. 3(4).

STATEMENT

1. The Interstate Commerce Commission determined that petitioner Bangor and Aroostook Railroad Company (BAR), aided by petitioner Canadian Pacific Limited (CP), unduly prejudiced Maine Central Railroad Co. (MEC) and Boston and Maine Corporation (B&M) in the distribution of traffic, in violation of Section 3(4) of the Interstate Commerce Act (the Act), as amended, 54 Stat. 903, 49 U.S.C. 3(4).[1] The Commission ordered BAR to pay damages to MEC and B&M for its violations.[2] See Section 16(1) of the Act, as amended, 34 Stat. 590, 49 U.S.C. 16(1). The court of appeals affirmed the Commission's finding that petitioners had violated Section 3(4) and sustained the Commission's award of damages.[3]

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[1]Section 3(4) provides that carriers "shall not * * * unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

[2]MEC was awarded $176,323; B&M was awarded $86,917 (Pet. App. A-110).

[3]Having found that petitioners violated Section 3(4) the Commission also issued a cease and desist order (Pet. App. A-110). The court of appeals, while upholding the Commission's findings on liability and damages, concluded that the cease and desist order was too general (Pet. App. A-34 to A-37). The court remanded the case to allow the Commission to specify the conduct intended to be prohibited by the cease and desist order. On June 1, 1978, the Commission reopened the proceeding to comply with the court's mandate (Pet. App. A-48 to A-49).

2. BAR is an originating carrier, receiving goods directly from shippers and transporting them to destinations through interconnecting carriers. BAR connects in northeastern Maine with CP at Brownville Junction and with MEC at Northern Maine Junction (Pet. App. A-55). In November 1969 BAR initiated a traffic study to determine the extent to which traffic moving through the Northern Maine Junction could be rerouted to CP at the Brownville Junction. It also commenced negotiations with CP to implement a rerouting plan (*id.* at A-56 to A-58).[4] As a result of those negotiations, BAR agreed to supply CP with confidential data concerning traffic origination and termination on BAR lines, which CP used to solicit new traffic. A written agreement, executed in July 1970, confirmed BAR's intention to divert "as many cars of paper products and potatoes as * * * possible" (*id.* at A-62). CP also confirmed by letter its understanding that the diversion plan would be long-term in nature (*id.* at A-57 to A-61).[5]

BAR notified all sales personnel and all station agents that they should "start soliciting at once all traffic possible through Brownville Junction" (Pet. App. A-60). BAR also

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[4]The Commission concluded that it was unnecessary to ascertain BAR's motive for diverting the traffic (Pet. App. A-78). It found, however, that BAR and CP initiated the rerouting "without regard to the service considerations of each connecting line and with the knowledge that a substantial diversion of traffic would seriously harm both MEC and B&M." *Ibid.* In an internal memorandum, BAR estimated that MEC and B&M would lose $2,800,000 per year as a result of the diversion plan. (Pet. App. A-57). The record also shows that BAR had been considering a takeover of MEC, and certain evidence indicated that the diversion plan was intended to "weaken MEC financially" to "make a take-over easier" (*id.* at A-64).

[5]BAR anticipated that this traffic diversion plan could affect its revenues adversely. To mitigate that effect, BAR induced CP to pay it a "car allowance" for every car routed to CP at Brownville Junction that would result in a diminished rate of return for BAR (Pet. App. A-5, A-6).

forwarded routing guides to the principal shippers on its lines; these showed only routings by CP over the Brownville Junction (*id.* at A-61). CP's sales personnel added to the solicitation effort, and joint visits by BAR and CP representatives to shippers took place to intensify the solicitation (*ibid.*). Those personnel made representations to shippers about purported service advantages that would result from using the Brownville Junction, such as transit time, car supply, and reliability, without investigating or confirming the factual basis for such representations (*id.* at A-7 n. 7, A-11).[6]

The BAR diversion plan resulted in a substantial reduction of traffic shipped over MEC. The agreement remained in effect for five years, until the parties terminated it in the beginning of 1975 (Pet. App. A-7). The Commission concluded that this pattern of preferential treatment violated Section 3(4) of the Act. The court of appeals affirmed that determination, stating that it had "little hesitancy in upholding the Commission on the facts of this case" (Pet. App. A-12).

ARGUMENT

The opinion of the court of appeals, on which we generally rely, correctly applied the decisions of this Court. There has been little litigation concerning the interpretation of Section 3(4), and there is no conflict in decisions. Indeed, the court of appeals' decision was practically compelled by *Southern Pacific Co.* v. *United States*, 390 U.S. 744, summarily affirming 277 F. Supp. 671 (D. Neb.).

1. Petitioners argue (Pet. 21-27) that their conduct did not violate Section 3(4). But the Commission's finding that petitioners "unduly prejudiced" a connecting carrier

[6]The court of appeals concluded that BAR's recommendations to shippers were "recklessly made" and "at least misleading" even though the Commission did not find that they were fraudulent (Pet. App. A-17).

by the scheme artificially to redistribute traffic is supported by substantial evidence and is consistent with the decisions of this Court. As this Court held in *Western Pacific Railroad Co.* v. *United States*, 382 U.S. 237, 244, the purpose of Section 3(4) is "to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange." The Commission's construction of Section 3(4) carries out this purpose and also helps to ensure "sound economic conditions in transportation and among the several carriers" and to prevent "undue preferences or advantages, or unfair or destructive competitive practices." See the Declaration of National Transportation Policy, preceding 49 U.S.C. 1.[7]

BAR and CP arranged to reroute BAR-originated traffic over CP's lines, to the detriment of MEC and B&M. BAR implemented that plan through a concerted traffic solicitation campaign based on otherwise confidential shipper data and misleading recommendations. As a direct result of petitioners' effort, MEC and B&M suffered financial injury to the extent of the traffic so diverted. As the three-judge district court explained in *Southern Pacific Co., supra*, 277 F. Supp. at 685:[8]

> The prohibition of Section 3(4) is against discriminatory conduct of the carrier against

[7]As this Court stated in *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 421, the declaration of national transportation policy is " 'the yardstick by which the correctness of the Commission's actions will be measured.' "

[8]The jurisdictional statement in *Southern Pacific* presented the Section 3(4) issue for decision by this Court (Pet. App. A-9 n. 7A). This Court's summary affirmance thus was a decision on the merits. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345. Petitioners argue (Pet. 24) that the Court should overrule *Southern Pacific*, because lower courts are construing it as prohibiting solicitation "pure and simple." There is no basis for that assertion. The court of appeals here carefully limited its holding to the facts of this case and specifically left open the possibility that preferential solicitation in other contexts might be justified by economic or practical factors (Pet. App. A-12 to A-13).

> connecting lines. The Act cannot be circumvented by wrongfully inducing the shipper to commit the discrimination in place of the carrier.* * *
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> * * * [W]e feel that preferential solicitation when done on a "preconcerted" and "systematic" discriminatory basis, as conducted by the parties herein, falls within the statutory prohibition of Section 3(4) as well. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper.

The Commission's application of Section 3(4) to the facts in this case was a proper exercise of its statutory authority. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 748-749.

2. a. Petitioners argue (Pet. 15-21) that any attempt to penalize commercial solicitation of businesses violates the First Amendment. It seems clear, however, that commercial solicitations may be regulated in order to implement substantive legal rules. *Ohralik* v. *Ohio State Bar Association*, No. 76-1650, decided May 30, 1978. Many offenses have speech as a central element—conspiracy crimes and antitrust violations are common examples. Improper solicitation of business, here as in *Ohralik*, is another. The concerted scheme to redistribute traffic to the detriment of competitors in violation of Section 3(4) was no more "protected speech" than a conspiracy to violate the antitrust laws or a deceptive securities offering. See *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978, slip op. 17: "The First Amendment does not 'make it * * * impossible ever to enforce laws against agreements in restraint of trade.'" See also *Ohralik, supra*, slip op. 12, 14, 15 n. 20. As the Court observed there, the

government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.* at 9. See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 n. 24.

b. Petitioners further contend (Pet. 15-21) that the court of appeals' decision leaves unresolved the scope of permissible solicitation under Section 3(4), and that general guidance from the Court is required by the First Amendment. But the court of appeals remanded the case to the Commission to determine which future solicitations should be permitted under the cease and desist order (Pet. App. A-34 to A-37).[9] The Commission has reopened proceedings in compliance with the court's mandate (*id.* at A-48 to A-49), and petitioners may present to the Commission their contentions regarding the appropriate scope of its prohibition. The question that petitioners present to this Court has not been decided and is not ripe for review. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328.

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[9]Petitioners erroneously assert (Pet. 15) that the court of appeals banned all solicitation efforts favoring one connecting carrier. The court specifically stated: "We leave open the possibility that solicitation by an originating carrier could in some circumstances find a legal justification in factors other than service differential" (Pet. App. A-13 n. 10). The court also emphasized that its construction of Section 3(4) "does not dictate silence on the part of carriers" (Pet. App. A-17). The court's holding applies to solicitations carried out as part of a scheme to discriminate in violation of Section 3(4), where reckless and misleading recommendations are part of the scheme, and where no legitimate basis for the discrimination has been established.

c. The fact that the Commission awarded damages does not affect the First Amendment principles involved.[10] To calculate the extent of the damages to MEC and B&M resulting from the action of BAR and CP, the Commission made the "before and after" comparison approved by this Court in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555. It projected the expected market shares of the two carriers in diverted traffic on the basis of pre-violation market figures, and it compared those shares with the actual market shares enjoyed by MEC and B&M over the four-year period when the unlawful activity was in progress (Pet. App. A-18). The Commission then computed the number of carloads lost and the resulting loss of revenues. To each carload the Commission allocated a portion of the carrier's operating expenses, based on the operating ratios of the carrier. The Commission employed the resulting net revenue loss figure as the basis for its damage award (Pet. App. A-18 to A-32).[11]

Petitioners maintain (Pet. 28-30) that the damage award is too large because it includes compensation for some traffic diverted on the basis of solicitations containing accurate information. All of the solicitations, however, were part of a single illegal plan, and it was that

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[10]The damage award was authorized by 49 U.S.C. 8 and 16(1). The Commission reduced its damage award to eliminate all speculative and unsupported elements. Its conservatism is shown by repeated reductions of the proposed damage award of the administrative law judge (Pet. App. A-93 to A-106).

[11]The court of appeals noted that the Commission's difficulty in computing damages was increased by BAR's destruction of financial records, and it properly concluded that the wrongdoer should not escape liability because of uncertainty caused by its own conduct (Pet. App. A-20).

plan to divert traffic that "unduly prejudiced" MEC and B&M. The Commission applied well-settled damage law principles, and its factual determination does not require further review in this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749.

3. Petitioners' contention that the statute of limitations bars part of the recovery (Pet. 31-35) is unavailing. Fraudulent concealment justifies equitable tolling of limitations periods. *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, No. 77-598, decided June 19, 1978 (Burger, C.J., concurring). Tolling was proper here under the standards of *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397. Under the rule in *Holmberg*, the statute of limitations does not begin to run until the violation has been discovered or should, through due diligence, have been discovered. The court of appeals fully explained the reasons—including efforts made by petitioners to conceal their misconduct and to evade inquiry (Pet. App. A-32 to A-34, A-40 to A-46)—why the statute of limitations did not begin to run until 1972. Further review of the concurrent factual determinations of the court of appeals and the Commission is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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